Petition

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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

THE CITY OF WICHITA FALLS, TEXAS, ET AL
PETITIONERS

VS.

DUWARD W. STONE
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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VS.

DUWARD W. STONE
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QUESTIONS PRESENTED FOR REVIEW

I. Is Section 136 of the Charter of the City of Wichita Falls invalid because it conflicts with Article 1269m, Section 22, Texas Revised Civil Statutes?

II. Is Section 136 of the Charter of the City of Wichita Falls invalid because it conflicts with Section 40 of Article 16 of the Texas Constitution? (This question was presented to, but was not passed on by, the Court of Appeals.)

III. Is Section 136 of the Charter of

the City of Wichita Falls invalid because it violates the First and Fourteenth Amendments of the Federal Constitution? (This question was presented to, but was not passed on by, the Court of Appeals.)

LIST OF ALL PARTIES

The Plaintiff was Duward W. Stone, and the Defendants were the City of Wichita Falls; Hurshel Johnson, Fire Chief for the City or his successor; Gerald G. Fox, City Manager, or his successor; Kenneth Hill, Mayor, or his successor; City Council Members, Hardy McAllister, Fred Bassett, Mrs. Carol Russell, Curtis W. Smith, James B. Thomas, and Raymond H. Adcock, or their successors. The Defendants were sued only in their representative capacities and not as individuals. Stuart A. Bach has succeeded Gerald G. Fox, Gene

Shearman has succeeded Hardy McAllister, Dr. Horace Boston has succeeded Raymond H. Adcock, and John W. Hampton has succeeded Fred Bassett.

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CONSTITUTIONAL AND CHARTER PROVISIONS AND STATUTES

Texas Constitution, Art. 11, Sec. 5 13

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Texas Revised Civil Statutes, Art. 1269m, Sec. 22 A26

Wichita Falls City Charter, Sec. 136 7

OPINIONS DELIVERED BELOW

An Opinion was delivered by the United States Court of Appeals for the Fifth Circuit on June 4, 1981. This Opinion, which has not been reported, is shown on Page A1 of the Appendix.

The District Court for the Northern District of Texas, Wichita Falls Division, delivered an Opinion on September 17, 1979. This Opinion, which is reported in 477 F. Supp. 581, is shown on Page A8 of the Appendix.

JURISDICTION

The Judgment of the Court of Appeals sought to be reviewed is dated June 4, 1981, and the time of its entry was June 4, 1981.

The statutory provision which confers on this Court jurisdiction to review the Judgment in question by writ of certiorari is 28 U.S.C. §1254 (1).

CHARTER AND CONSTITUTIONAL PROVISIONS AND STATUTE

The following Charter and Constitutional Provisions and Statute are involved in this case:

Section 136 of the Charter of the City of Wichita Falls, which reads as follows:

> "No member of the Board of Aldermen shall, during the term for which he is elected, be appointed to any City, County or State office or employment. Any appointive officer or employee of the City who shall become a candidate for election to any office shall forfeit the office or employment held under the City".

Article 16, Section 40 of the Texas Constitution, which reads in pertinent part as follows:

> "No person shall hold or exercise at the same time, more than one civil office of emolument, except that of Justice of the Peace, County Commissioner, Notary Public and Postmaster..."

Article 1269m, Section 22 of the Texas Revised Civil Statutes, which is set out on Page A26 of the Appendix.

STATEMENT OF THE CASE

Respondent Stone was a Firefighter in the Wichita Falls Fire Department on February 9, 1978, and had been so employed for the preceding eight years. Prior to February 9, 1978, he became a candidate for the office of County Commissioner of Archer County, Texas, an adjoining County to Wichita Falls, subject to the Democratic Primary Election to be held in May, 1978. By letter dated February 9, 1978, Fire Chief Johnson notified the Firemen's and Policemen's Civil Service Commission of Wichita Falls that he was suspending Stone effective February 16, 1978, as required by Section 136 of the Wichita Falls City Charter.

Stone appealed his suspension to the Wichita Falls Civil Service Commission, which held a hearing and entered an order finding the charge was true and ordering Stone permanently discharged from the Fire Department. Stone took no appeal from the Commission to the State District Court. At the Democratic Primary Election in May, Stone was elected as candidate for County Commissioner of Archer County and, in the General Election, he was elected County Commissioner.

Respondent Stone filed this suit on June 26, 1978, alleging jurisdiction under 28 U.S.C. §1343 and 42 U.S.C. §1983 against the City, the Fire Chief, the City Manager, the Mayor and City Council, in their official capacities and not as individuals. He alleged that Section 136 was contrary to Article 1269m,

Section 22, Revised Civil Statutes of Texas, Article 16, Section 40 of the Texas Constitution, and the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

The District Court found that, as applied to Stone, Section 136 was invalid because it conflicts with Article 1269m, Section 22 and with Article 16, Section 40; also Section 136 violates the First and Fourteenth Amendments of the Federal Constitution as applied to Stone. The District Court permanently enjoined enforcement of Section 136 against Stone, and ordered that Stone be reinstated and awarded back pay by City.

After the entry of the Judgment in the District Court, Stone resigned from his position as Firefighter.

The Court of Appeals affirmed the

Judgment of the District Court on the ground that Section 136 is inconsistent with Article 1269m, Section 22, and is void; it did not address the Texas or United States constitutional issues.

ARGUMENT

IS SECTION 136 OF THE CHARTER OF THE CITY OF WICHITA FALLS INVALID BECAUSE IT CONFLICTS WITH ARTICLE 1269m, SECTION 22, TEXAS REVISED CIVIL STATUTES?

Although the Petitioners realize that this Court generally accepts the views of a lower Federal Court on questions of local law, the Petitioners feel that the lower Courts were clearly wrong in holding that Section 136 is inconsistent with Article 1269m, Section 22, Texas Revised Civil Statutes.

The Texas rule concerning conflicts between a city ordinance or charter and a state statute was set out in City of

Beaumont v. Bond, 546 SW2d 407 (Beaumont Civ. App. 1977, error refused, n.r.e.), as follows:

> "It has long been settled that a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. (Citing cases.) Moreover, it is the duty of the Court to reconcile the ordinance with the general law if a fair and reasonable construction of seemingly conflicting enactments will leave both in concurrent operation. (Citing case.)"

In City of Beaumont v. Fall, 291 SW 202 (Com. App., 1927), the Texas Commission of Appeals stated, at Page 206,

> "Of course, a general law and a city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached. In other words, both will be enforced if that be possible under any reasonable construction, just as one

> general statute will not be held repugnant to another unless that is the only reasonable construction."

Absent the proviso at the end of Section 22, both the charter provision and the statute could be enforced, as the charter provision deals only with candidacy, while the statute is silent in that respect.

The Texas Legislature then added the proviso that prohibited the Civil Service Commission and the governing body of the City from further restricting the political activities of Firemen and Policemen. The District Court and Court of Appeals held that by this proviso the Legislature also prohibited the City voters in their Charter from further prohibiting such political activities.

Article 11, Section 5, Texas Constitution says in part:

> "Cities having more than 5,000 inhabitants may, by a majority vote of the qualified voters of said City, at an election held for that purpose, adopt or amend their charters...."

In City of Fort Worth v. Morrison, 164 SW2d 771 (Ft. Worth Civ. App. 1942, error refused), the Court said:

> "This Charter is the organic law of said City and its relation to the City is not unlike the relation of the Constitution of the State of Texas to the State."

Therefore, the City Charter is of greater dignity than a Board of Aldermen ordinance or a Civil Service Commission rule. In spite of this, both the District Court and the Court of Appeals held that the proviso prohibiting action by the governing body and the Civil Service Commission also prohibited the voters from acting. This is similar to saying that, if the Congress and

a federal agency were prohibited from taking certain action, that this would also prohibit that action from being added to the United States Constitution by the Legislatures or conventions as authorized by Article V of the Constitution. Surely no one would urge such a proposition as that. Therefore, the proviso does not prohibit the voters from putting such a restriction in their City Charters, and the charter provision and the state statute can be harmonized without conflict.

This is a matter of utmost importance to city governments in Texas. This Court, in United States Civil Service Commission v. National Association of Letter Carriers, 93 S.Ct. 2880 (1973) and in Broadrick v. State of Oklahoma, 93 S.Ct. 2908 (1973), recognized the potential dangers of allowing public

employees from taking an active part in political management or in political campaigns, including becoming a partisan candidate for an elective public office. But if the judgment of the Court of Appeals is allowed to stand in this case, the Wichita Falls voters have been denied the authority to prohibit one of their City employees from becoming a partisan candidate for an elective public office.

IS SECTION 136 OF THE CHARTER OF THE CITY OF WICHITA FALLS INVALID BECAUSE IT CONFLICTS WITH SECTION 40 OF ARTICLE 16 OF THE TEXAS CONSTITUTION? (This question was presented to, but was not passed on by, the Court of Appeals.)

The District Court held that Section 136 was invalid because it conflicts with Section 40. We would again refer to the Texas Rule set out in City of

Beaumont v. Bond, supra, and City of Beaumont v. Fall, supra. Petitioners believe that a reasonable construction leaving both Section 136 and Section 40 in effect can be reached.

The purpose of Section 40 is to prohibit persons from holding more than one of a certain class or group of public offices, which class or group does not include Justice of the Peace, County Commissioner, Notary Public and Postmaster. This prohibition could have been written in another way, but much lengthier, if it had named all the prohibited public offices in the class or group, and omitted Justice of the Peace, County Commissioner, Notary Public and Postmaster. Obviously, the purpose of Section 40 is to prevent the objectionable practice of dual office holding. The framers of the Constitution did not

deem it necessary to prohibit the practice when one of the offices was County Commissioner. However, the voters in adopting Section 136 considered that dual office holding was objectionable even when one of the offices was County Commissioner. Section 136 and Section 40 can be harmonized and both enforced; one prohibits dual office holding among a certain group of offices, and the other prohibits dual office holding among a different group of offices. Section 40 does not purport to grant the right to hold two offices when one is County Commissioner.

It follows, then, that the Charter provision is not in conflict with the constitutional provision.

IS SECTION 136 OF THE CHARTER OF THE CITY OF WICHITA FALLS INVALID BECAUSE IT VIOLATES THE THE FIRST AND FOURTEENTH AMENDMENTS OF THE FEDERAL

CONSTITUTION? (This question was presented to, but was not passed on, by the Court of Appeals).

This Honorable Court has long upheld restrictions on public employees' political activities, going back to Ex parte Curtis, 106 US 371, in 1882. In United Public Workers of America (CIO) v. Mitchell, 330 US 75 (1947), the Supreme Court upheld the constitutionality of the Hatch Act. This Court said:

> "The conviction that an actively partisan governmental personnel threatens good administration has deepened since Ex parte Curtis."

In United States Civil Service Commission v. National Association of Letter Carriers, supra, and in Broadrick v. State of Oklahoma, supra, the Supreme Court upheld the constitutionality of restrictions against public employees

participating in partisan political activities, including being a candidate for nomination or election to any public office.

This is exactly what Petitioner Stone did, and yet the District Court held that the City restriction against his doing so violates the First and Fourteenth Amendments of the Federal Constitution. The District Court did not cite nor distinguish Letter Carriers and Broaderick.

CONCLUSION

Petitioners would urge that this is a case of extreme importance to the cities of Texas, as it prevents the citizens of a City like Wichita Falls from prohibiting their City employees from becoming a partisan candidate for public office. This is a position which is directly contrary to the philosophy

which was established by this Honorable Supreme Court in Letter Carriers and Broderick. In this case, the Court of Appeals has so far departed from the accepted and the usual course of judicial proceedings, and has sanctioned such a departure by a lower Court as to call for an exercise of this Honorable Supreme Court's power of supervision.

WHEREFORE, these Petitioners pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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76301
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(817) 322-5611

CERTIFICATE OF SERVICE

I hereby certify that I have served 3 copies of the above and foregoing Petition on the Respondent, Duward W. Stone, by depositing such copies in the United States Post Office, with first-class postage prepaid, addressed to Larry Watts, his Counsel of Record, at his post office address, 2325 University Blvd., Houston, Texas 77005, on the 1st day of Sept., 1981.

Henry P. Hodge Jr.
Henry P. Hodge, Jr.
Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-3940

DUWARD W. STONE
PLAINTIFF-APPELLEE

VS.

THE CITY OF WICHITA FALLS, TEXAS, ET AL
DEFENDANTS-APPELLANTS

OPINION

GARZA, Circuit Judge:

Appellee, Duward W. Stone, was a Firefighter in the Fire Department of the City of Wichita Falls, Texas on February 9, 1978, and had been so employed for the preceding eight years. Prior to February 9, 1978, Stone became a candidate for the office of County Commissioner of Archer County, Texas, subject to the Democratic Primary Election to be held in May,

1978. By letter dated February 9, 1978, the Fire Chief notified the Firemen's and Policemen's Civil Service Commission of Wichita Falls that he was suspending Stone effective February 16, 1978, as required by Section 136 of the Wichita Falls City Charter.[1]

Stone appealed his suspension to the Wichita Falls Civil Service Commission which held a hearing and entered an order finding the charge against Stone was true and ordering Stone permanently discharged from the Wichita Falls Fire Department. No appeal was taken by Stone from the Commission to the State District Court.[2]

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1. Section 136 provides in pertinent part:

> "Any appointive officer or employee of the city who shall become a candidate for election to any office shall forfeit the office or employment held under the City."

At the Democratic Primary Election in May, Stone was elected as candidate for County Commissioner of Archer County and, in the November General Election, was elected County Commissioner.

On June 26, 1978, Stone filed this suit, alleging jurisdiction under 28 U.S.C. §1343 and 42 U.S.C. §1983, against the City of Wichita Falls, the Fire Chief, the City Manager, the Mayor and City Council, in their official capacities and not as individuals. Stone's suit alleged that Section 136 was contrary to Article 1269m(22) V.A.T.S.,[3] Article XVI, Section 40 of the Texas Constitution[4] as well as the First, Fifth, Ninth and Fourteenth Amendments to the United States Consti-

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2. Article 1269m(18) V.A.T.S. provides that a Fireman dissatisfied with the decision of the Civil Service Commission may, within ten days of the decision, petition the State District Court for a de novo hearing.

tution and sought declaratory and injunctive relief, reinstatement, and back pay.

[1] After submission of stipulated facts, briefs and oral argument, the District Court found that Section 136 violates Article 1269m(22), Article

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3. Article 1269m(22) V.A.T.S. provides:

Political activities; leaves of absence

Employees in the Fire Department or Police Department shall not be permitted to take an active part in any political campaign of another for an elective position of the city if they are in uniform or on active duty. The term active part means making political speeches, passing out cards, or other political literature, writing letters, signing petitions, actively and openly soliciting votes and making public derogatory remarks about candidates for such elective positions.

Firemen and Policemen coming under the provisions of this Act are not required to contribute to any political fund or render any political service to any person or party whatsoever, and no person shall be removed, reduced in classification or salary, or otherwise prejudiced by refusing to do so; and any official of any city coming under the provisions of this Act who attempts the same shall be guilty of violating the provisions of this Act.

No Fireman or Policeman shall be refused reasonable leave of absence without pay, pro-

XVI, Section 40, and the First Amendment.[5] The District Court permanently enjoined enforcement of Section 136 against Stone, ordered that Stone be reinstated and awarded back pay. Appellants now contest all three of the District Court's substantive

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vided that a sufficient number of employees to carry out the normal functions of the Department shall be provided, for the purpose of attending any fire or police school, conventions, or meetings, the purpose of which is to secure more efficient departments and better working conditions for the personnel thereof, nor shall any rule ever be adopted affecting their constitutional right to appear before or petition the Legislature. Provided however, that no Civil Service Commission or governing body of any city shall further restrict the rights of employees of the Police and Fire Departments to engage in political activities except as herein expressly provided. (emphasis added).

4. Article XVI, Section 40 of the Texas Constitution provides:

Holding more than one office; exceptions; right to vote

No person shall hold or exercise at the same time, more than one civil office of emolument, except that of Justice of the Peace, County Commissioner, Notary Public and Postmaster . . .

conclusions of law.[6] Specifically, appellants argue that Article 1269m(22), although prohibiting political activity restrictions enacted by the Civil Service Commission or the City Council, does not prohibit a City's Voters from enacting otherwise prohibited restrictions. The appellant's argument is without merit.

[2] Article 11, Section 5 of the Texas Constitution provides ". . . that no charter or any ordinance passed . . . shall contain any provision inconsistent

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5. In the District Court's opinion reported at 477 F. Supp. 581 (N.D.Tex. 1979), the Court also found that Stone's failure to exhaust his State judicial remedies under Article 1269m(18) V.A.T.S. did not deprive the District Court of subject matter jurisdiction. The Court also found that Pullman type abstention was not appropriate in this case.

6. Appellants also contend that the District Court lacked jurisdiction because the back pay award, at the time of filing suit, was less than $10,000. It is clear that causes of action based upon 42 U.S.C. § 1983 do not require a $10,000 amount in controversy. Appellants' first contention is meritless.

with the Constitution of the State, or the general laws enacted by the Legislature of this State. . ." See also, Article 1165 V.A.T.S. Appellants concede Article 136 of the City Charter imposes greater restrictions on political activity than are imposed in Article 1269m(22). We believe it is precisely this sort of restriction which the Texas Legislature intended to prevent by prohibiting further restrictions upon the political rights of civil service employees. We, therefore, hold that the City Charter is inconsistent with Article 1269m(22) and consequently is void. We need not address the Texas or United States constitutional issues.

AFFIRMED June 4, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION
CIVIL ACTION NO. CA-7-78-36

DUWARD W. STONE
PLAINTIFF

VS.

THE CITY OF WICHITA FALLS, TEXAS, ET AL
DEFENDANTS

MEMORANDUM OPINION

This cause came on for trial before the Court, and having heard the evidence and argument of counsel the Court makes the following findings of fact and conclusions of law.

On February 9, 1978, the City of Wichita Falls ("City") indefinitely suspended plaintiff Duward Stone ("Stone") from his position as a fireman because he violated Section 31(B) of City Civil Service Rule 14[1/] and Section 136 of the City Charter ("Section 136")[2/] by becoming a candidate for County Commissioner in nearby Archer County.

The City discharged Stone after he unsuccessfully appealed his indefinite suspension to the Civil Service Commission. Stone then by-passed available state judicial remedies[3] and brought this action against the City and the City's fire chief, mayor, city manager, and council members in their official capacities. Stone now holds the office of County Commissioner of Archer County.

In this action for declaratory and injunctive relief, reinstatement, and back pay, Stone contends that Section

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1/ Section 31(B) of Civil Service Rule 14 provides that an employee's "[v]iolation of any provision of the City Charter, any ordinance of the City of Wichita Falls, the Civil Service Rules, Department Rules or Special Orders as applicable" constitutes cause for indefinite suspension.

2/ Section 136 of the City Charter provides in pertinent part that "[a]ny . . . employee of the City who shall become a candidate for election to any office shall forfeit the office or employment held under the City."

3/ Tex. Rev. Civ. Stat. Ann. art. 1269m(18) (Supp. 1978).

136 violates article 1269m(22) of the Texas statutes[4], Section 40 of Article 16 of the Texas Constitution ("Section 40")[5], and the First, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution.[6] The defendants preliminarily contend that this Court lacks subject matter jurisdiction because Stone failed to exhaust his state judicial remedies and that this Court should abstain because this action hinges on unsettled questions of state law. The defendants also argue that Section 136 does not violate either article 1269m (22) or the state or federal constitution. The Court rejects the defendants'

4/ Tex. Rev. Civ. Stat. Ann. art 1269m (22) (Supp. 1978).

5/ Tex. Const. Art. XVI, §40 (1972).

6/ U. S. Const. amends. I, V, IX, and XIV.

contentions and holds that Section 136 violates article 1269m(22), Section 40, and the First Amendment of the United States Constitution as applied to municipalities through the Fourteenth Amendment.

Defendants' argument that Stone's failure to exhaust available state judicial remedies under Tex. Rev. Civ. Stat. Ann. art. 1269m (18)(Supp. 1978) deprives this Court of subject matter jurisdiction lacks merit. Monroe v. Pape, 365 U.S. 167 (1961). The Court finds the defendants' argument about the abstention doctrine's applicability more troublesome.[7/] However, the Court

7/ In their post-trial brief on the possible application of the abstention doctrine the defendants purport to waive their objection on abstention grounds unless abstention mandates dismissal of Stone's claims with prejudice. The Court is unconvinced that a party may waive the possible application of the abstention doctrine. Moreover, the Court would not be required to dismiss Stone's complaint even if it decided to abstain pending a state court's clarification

has concluded that this case does not present the "special circumstances" prerequisite to the application of the abstention doctrine. Propper v. Clark, 337 U.S. 472, 492 (1949). First, the answers to the question of state law presented by this case are clear even in the absence of a definitive state court case construction of article 1269m(22). See, e.g., Chicago v. Atchison, Topeka & Santa Fe Railway, 357 U.S. 77 (1958); Doud v. Hodge, 350 U.S. 485 (1956). Furthermore, Stone may have no "obvious [method] for securing a definitive ruling in the

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and interpretation of Section 136, article 1269m (22), and Section 40. See, e.g., Zwickler v. Koota, 389 U.S. 241, 244 n.4 (1967); Doud v. Hodge, 350 U.S. 485 (1956); Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). However, the defendants' qualified willingness to proceed in federal court weights against this Court's abstention. Cf. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324,329 (1964) (abstention unwarranted when neither party urged court to abstain and when decision had already been delayed).

that "[e]mployees in the Fire Department or the Police Department shall not be permitted to take an active part in any political campaign of another for an elective position of the city if they are in uniform or on active duty . . . . Provided however, that no Civil Service Commission or governing body of any city shall further restrict the rights of employees of the Police and Fire Departments to engage in political activities except as herein expressly provided" (Emphasis added). Thus, the plain language of article 1269m(22) permits Stone's candidacy for County Commissioner of Archer County and invalidates Section 136 as applied to Stone.[8/]

8/ Tex. Rev. Civ. Stat. Ann. art. 1269n (Supp. 1978) which imposes criminal penalties on any person who coerces a fireman "to participate or to refrain from participating in a political campaign" buttresses the Court's conclusion that Section 136 violates the proviso of article 1269m(22).

state courts" on the questions of state and federal law that he raises. Railroad Commission v. Pullman Co., 312 U.S. 496, 501 (1941). Indeed, Stone probably waived his right to a trial de novo under Tex. Rev. Civ. Stat. Ann. art. 1269m(18) by failing to file an action in state district court within ten days of the Civil Service Commission's adverse decision. After weighing the defendants' willingness to proceed in this Court, see n. 4 supra, the relative clarity of the pendent state law claims, and the uncertainty of Stone's state remedies, the Court declines to abstain.

The Court has concluded that Section 136 conflicts with both article 1269m(22) and Section 40. Section 136 proscribes Stone's candidacy for County Commissioner of Archer County. Article 1269m(22) provides in pertinent part

The defendants attempt to minimize the conflict between Section 136 and article 1269m (22) in two ways: first, they contend that Section 136's blanket proscription of candidacy is not inconsistent with article 1269m(22)'s proscription of active campaigning on another's behalf in city elections; second, they contend that the proviso of article 1269m(22) prohibits only those restrictions on political activity that are enacted by either the City's Civil Service Commission or the City Council and not to those restrictions, such as Section 136, that are enacted by the City's voters. The Court is unconvinced. Section 136's blanket proscription of candidacy is patently inconsistent with article 1269m(22); moreover, the Court would exalt form substance if it were to allow the City's Civil Service Commission to enforce a restriction

that the Civil Service Commission itself could not adopt. Cf. Reitman v. Mulkey, 387 U.S. 369 (1968) (California constitutional amendment that had been initiated and approved by voters implicated state in illegal racial discrimination and thus violated Equal Protection clause).

Section 136 also conflicts with Section 40 and thus violates the Texas Constitution. Section 40 provides in pertinent part that "[n]o person shall hold or exercise at the same time, more than one civil office of emolument, except that of . . . County Commissioner unless otherwise specially provided herein. . . ." It is well-settled that a city or state employee may also hold the position of county commissioner. Gaal v. Townsend, 77 Tex. 464, 14 S.W. 365 (1890)(dicta); cf. Ramirez v. Flores, 505 S.W. 2d 406 (Tex. Civ. App. --

San Antonio 1973, writ ref'd n.r.e.) (county commissioner precluded from running for position of school district trustee only because more specific state constitutional provision controlled). Although the City admits that Section 40 allows Stone to hold the positions of County Commissioner and Fireman, it defends Section 136's prohibition of Stone's candidacy. The Court must reject such an illogical defense.

Although the Court's resolution of Stone's pendent state law claims entitles Stone to the relief that he seeks, the Court is compelled to comment that Section 136 as applied to Stone violates the First and Fourteenth Amendments of the federal Constitution. Stone's right to run for County Commissioner is an important, but not a fundamental, right protected by the First Amendment. Bullock v. Carter, 405 U.S. 134 (1972);

Magill v. Lynch, 560 F.2d 22, 27 (1st Cir. 1977), cert. denied, 434 U.S. 1063 (1978); Hickman v. City of Dallas, No. 3-79-0222-H (N.D. Tex. Aug. 24, 1979). Thus, the City must prove that the strictures that Section 136 places on Stone's right to run for office are reasonably necessary to achieve one or more compelling public objectives. Morial v. Judiciary Commission, 565 F. 2d 295, 300 (5th Cir. 1977) (en banc), cert. denied, 435 U.S. 1013 (1978). The Court recognizes that the City may impose reasonable restrictions on its employees' right to run for office in order to ensure their loyalty and efficiency and in order to avoid the appearance of impropriety or conflicts of interest. However, the record contains no evidence to support the defendants' contention that Stone's candidacy for County Commissioner in

a county adjacent to the one in which the City is located either compromises his loyalty and his efficiency or creates the appearance of impropriety. Section 136 simply sweeps too broadly: its strictures are arbitrary and unconstitutional as applied to Stone. Hickman v. City of Dallas, supra.

Therefore, the defendants should be permanently restrained and enjoined from enforcing Section 136 against Stone because of his candidacy for County Commissioner of Archer County. Stone should be reinstated and awarded back pay. The Court will set this cause for a hearing to determine the amount of back pay to which Stone is entitled.

It is so ORDERED.

Dated this 17th day of September, 1979.

/s/ Robert M. Hill
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

WICHITA FALLS DIVISION

CIVIL ACTION NO. CA-7-78-36

DUWARD W. STONE
PLAINTIFF

VS.

THE CITY OF WICHITA FALLS, TEXAS, ET AL
DEFENDANTS

JUDGMENT

This cause came on for trial before the Court, and having heard the evidence, which was stipulated, and the argument of counsel, the Court made findings of fact and conclusions of law, and determined that judgment should be entered in favor of Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Defendants are permanently restrained and enjoined from enforcing Section 136 of the Charter of the City of Wichita Falls against Plaintiff because of his candidacy for County Commissioner of Archer County.

2. Section 136 of the Charter of the City of Wichita Falls is invalid, as applied to Plaintiff, because it conflicts with Article 1269m, Section 22, Texas Revised Civil Statutes, and Section 40 of Article 16 of the Texas Constitution; as applied to Plaintiff, such Section 136 violates the First and Fourteenth Amendments of the federal Constitution.

3. Plaintiff Stone shall be reinstated as a Firefighter in the Fire Department of the City of Wichita Falls, and the Defendants shall place Plaintiff

back on active duty on November 7, 1979, the beginning of a pay period.

4. Plaintiff Stone recover of the Defendant City of Wichita Falls, as back pay, the sum of $20,679.79, from which City shall deduct the applicable federal withholding taxes, social security deductions and firemens' relief and retirement fund deductions.

5. The Plaintiff recover of the Defendant City of Wichita Falls the sum of $4,500, as attorney's fees through the trial Court.

6. The money judgment recovered by Plaintiff herein shall bear interest at the rate of 9% per annum from the date of this judgment.

7. As of November 7, 1979, Plaintiff Stone will have a total accumulation of vacation of 17 1/2 days, a total accumulation of holidays of

7 days, and total accumulation of sick leave of 75 days.

8. All costs herein are taxed against the Defendant City of Wichita Falls.

9. All other relief sought herein by any party is expressly denied.

DATED this 5th day of November, 1979.

/s/ Robert M. Hill
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 79-3940

DUWARD W. STONE
PLAINTIFF-APPELLEE

VS.

THE CITY OF WICHITA FALLS, TEXAS, ET AL
DEFENDANTS-APPELLANTS

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 4, 1981

TEXAS REVISED CIVIL STATUTES

ARTICLE 1269m, SECTION 22

Employees in the Fire Department or Police Department shall not be permitted to take an active part in any political campaign of another for an elective position of the city if they are in uniform or on active duty. The term active part means making political speeches, passing out cards, or other political literature, writing letters, signing petitions, actively and openly soliciting votes and making public derogatory remarks about candidates for such elective positions.

Firemen and Policemen coming under the provisions of this Act are not required to contribute to any political fund or render any political service to any person or party whatsoever; and no person shall be removed, reduced in classification or salary, or otherwise

prejudiced by refusing to do so; and any official of any city coming under the provisions of this Act who attempts the same shall be guilty of violating the provisions of this Act.

No fireman or policeman shall be refused reasonable leave of absence without pay, provided that a sufficient number of employees to carry out the normal functions of the Department shall be provided, for the purpose of attending any fire or police school, conventions, or meetings, the purpose of which is to secure more efficient departments and better working conditions for the personnel thereof, nor shall any rule ever be adopted affecting their constitutional right to appear before or petition the Legislature. Provided however, that no Civil Service Commission or governing body of any city

shall further restrict the rights of employees of the Police and Fire Departments to engage in political activities except as herein expressly provided.

Opposition

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

81-447

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

THE CITY OF WICHITA FALLS, TEXAS, ET AL
PETITIONERS

VS.

DUWARD W. STONE
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LARRY WATTS
LAW OFFICES OF LARRY WATTS, P.C,
2325 University Blvd.
Houston, Texas 77005
Attorney for Respondent
(713) 669-0880

NO. _____

SUPREME COURT OF THE UNITED STATES

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VS.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent approves of the QUESTIONS PRESENTED FOR REVIEW, LIST OF ALL PARTIES, CITATIONS TO OPINIONS DELIVERED IN THE COURTS BELOW, STATEMENT OF JURISDICTION, CHARTER, STATUTE AND CONSTITUTIONAL PROVISIONS and STATEMENT OF THE CASE as stated in Petitioners' PETITION FOR WRIT OF CERTIORARI. Pursuant to Rules 22,33,and 34 Section 2, Supreme Court Rules, 28 U.S.C.A. RULES, the foregoing items are not included in Respondent's Brief in Opposition to Petitioners' Writ of Certiorari.

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ARGUMENT

QUESTION I:

IS SECTION 136 OF THE CHARTER OF THE CITY OF WICHITA FALLS INVALID BECAUSE IT FATALLY CONFLICTS WITH ARTICLE 1269, SECTION 22, TEXAS REVISED CIVIL STATUTES?

In support of Petitioners' Petition for Writ of Certiorari, Petitioners argue that the City's Charter and the State Statute are somehow reconcilable since it is the contention of Petitioners that Article 1269m is inapplicable as regards limitations implemented by the City voters. Petitioners cite a portion of the Texas Constitution as authority for this position, to wit:

> "Article 11, Section 5, Texas Constitution says in part:
>
> > 'Cities having more than 5,000 inhabitants may, by a majority vote of the qualified voters of said City, at an election held

> for that purpose, adopt or amend their charters....'"

However, Petitioners fail to cite the Section in its entirety, as follows:

> "...subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistant with the Constitution of the State, or of the general laws enacted by the legislature of this State;..."

Clearly, Petitioners' argument is without merit. The Supreme Court of the State of Texas has held that municipalities, as subdivisions of the State, are bound by the legislative limitations on State constitutional power and that such limitations extend to the City's voters. State ex rel. Rose v. City of La Porte, 386 S.W. 2d 782 (Tex. 1965); Burch v. City of San Antonio, 518 SW 2d 540 (Tex. 1975).

Petitioners' analogy to Congressional or Federal agency prohibitions which do not in themselves preclude such limitations from being

removed by Constitutional Amendments also fails under a complete reading of Article II, Section 5 of the Texas Constitution. To properly characterize Petitioners' analogy, Petitioners seek to give their City Charter the power and substance to override and amend Legislative enactments or Constitutional provisions, while ignoring express prohibitions to the contrary. Put in the proper perspective, " Surely no one would urge such a proposition as that. "

The language of Article 1269-m-(22) is clear. After setting out express limitations upon political activities by Fire and Police Department employees, it states:

> "Provided however, that no Civil Service Commission or governing body of any city shall further restrict the rights of employees of the Police and Fire Departments to engage in political activities except as herein expressly provided."

There is no dispute that Article 136 of the City Charter imposes greater restrictions on Respondent's political activities than Article 1269-m-(22) imposes. Article II,Section 5 of

the Texas Constitntion does not give city voters the authority to implement charter provisions which the Civil Service Commission or city governing body could not enact in their own right, as such enactments would be "inconsistent with the Constitution of the State or of the general laws enacted by the Legislature of this State." Article II,Section 5,Texas Constitution.

The certification of questions to the United States Supreme Court by the Court of Appeals is discretionary. Hyde v. Shine ,199 U.S. 62 (1905). Petitioners have cited no conflict with other circuits, with prior Supreme Court decisions or conflict between Federal and State relations. Rogers v. Quan 357 US 193 (1958); Pennsylvania R. Co. v. O'Rourke ,344 US 334 reh. den. 345 U.S. 913 (1952); Leiter Minerals,Inc. v. United States , 352 US 220 (1957), reh. den. 352 U.S. 1019 (19). As discussed below,Petitioners' cited cases, United States Civil Service Commission v. National Association of Letter Carriers ,US (1973) and Broadrick v. State of Oaklahoma ,US (1973),do not stand for the proposition that city voters, by virtue of a

charter approval,can take broad and sweeping actions which deny Respondent's Constitutional and state Legislative rights. The United States Court of Appeals for the Fifth Circuit recognized the hollowness of Petitioners' argument and properly affirmed the United States District Court decision. Petitioners present no questions of the peculiar gravity and general importance which this Honorable Court has recognized as necessary for the grant of certiorari review and as such,Petitioners' Writ should be denied.

ARGUMENT

QUESTION II :

IS SECTION 136 OF THE CHARTER OF THE CITY OF WICHITA FALLS INVALID BECAUSE IT CONFLICTS WITH SECTION 40 OF ARTICLE 16 OF THE TEXAS CONSITUTION?

(This question was presented to the District Court and Court of Appeals but was not passed on by the Court of Appeals.)

Section 40 of Article 16 of the Texas Constitution reads in part as follows:

> "Sec. 40. No person shall hold or exercise at the same time, more than one civil office of emolument, except that of...County Commissioner..., unless otherwise specially provided herein "

Petitioners argue that although the Texas Constitution specifically exempts the office of County Commissioner from the prohibition on dual office holding, the City of Wichita Falls has the power to prohibit dual office holding by a county commissioner.

Respondent's right to hold the position of fireman in the City of Wichita Falls while

concurrently serving as a county commissioner stems from Section 40 of Article 16. Ramirez v. Flores , 505 S.W.2d 406 (Tex.Civ.App. - San Antonio, 1973,writ, refused n.r.e.). Section 40 Article 16 of the Texas Constitution is specific in its terms and any city is generally prohibited from altering or expanding this constitional provision through the enactment a city ordinance or charter provision. In addition, Article II, Section 5 of the Texas Constitution specifically provides in part that:

> "...no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."

It has long been recognized that an ordinance inconsistant with a statute or the state constitution is inoperative and void by operation of law. As such,the District Court and Court of Appeals were correct in refusing to recognize Petitioners' arguments as meritorious.

ARGUMENT

QUESTION III :

IS SECTION 136 OF THE CHARTER OF THE CITY OF WICHITA FALLS INVALID BECAUSE IT VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION?
(This question was presented to the District Court and Court of Appeals but was not passed on by the Court of Appeals.)

The right to run for political office is an important right protected by the First Amendment to the Constition of the United States. Bullock v. Carter , 405 U.S. 134 (1972); Magill v. Lynch, 560F 2d 22, 27 Cert. denied ,434 U.S. 1063(1978); Hickman v. City of Dallas , No. 3-79-02220-H (N.D. Tex. Aug. 24, 1979).

Respondent's protected right to political activity is one to which the courts have applied

a level of scrutiny which requires the City of Wichita Falls to show a reasonable necessity for requiring Respondent to forfeit his employment with the City pursuant to the provisions of Section 136 of the Charter of City of Wichita Falls. Morial v. Judiciary Commission , 565 F2d 295, 302 (5th Cir. 1977) (en banc), Cert. denied , 435 U.S. 1013 (1978).

The compelling public objectives recognized by the courts as legitimate aims for statutes that restrict political activity by public employees center on ensuring loyalty and efficiency and in order to avoid the apperance of impropriety or conflicts of interest. United States Civil Service Commission v. National Association of Letter Carriers 413 US 548 (1973); Broadrick v. Oklahoma 413 US 601 (1973). In the case at bar, Respondent's political activities in no way create the type of conflict with the above stated objectives as to necessitate the intrusion by the City of Wichita Falls into his protected activities.

Respondent's political right are entitled to protection from arbitary or unreasonable

governmental interference. Section 136 of the Chanter of the City of Wichita Falls is overbroad and its appli ation arbitrarily denies Respondent of a protected right.

Limitations set out by legislative pronouncement that affect a protected right must be narrowly drawn. In United States Civil Service Commission v. National Association of Letter Carriers ,and Broderick v. Oklahoma , Justice White sets out the standard by which limiting statutes should be drawn:

> "...prohibitions...are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with,without sacrifice to the public interest."

Section 136 does not conform to this standard wherein it prohibits any employee from becoming a candidate for election to "any

office." "Any office" allows for infinite possibilities of interpretation upon which violations of Section 136 could be based. Under Section 136 one who is elected to the office of deacon of his church, the local board of the United Way or an officer of the P.T.A. could be held in violation of this provision.

The charter provision involved in this case lacks the clarity and specificity of similar statutes that have been held to be constitutional in prior cases. Section 136 clearly sweeps too broadly in its arbitrary denial of an important constitutionally protected right.

CONCLUSION

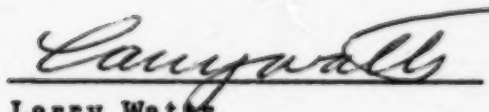
Respondents have failed to illustrate that the questions presented for review merit a grant

of certiorariby this Hononable Supreme Court. The Letter Carriers and Broderick decisions are entirely consistent with the lower Co rts' decisions herein and Petitioners' re ance upon such cases to the contrary is misplaced. Clearly, Section 136 of the City of Wichita Falls' Charter is violative of not only Article 1269 m (22), Vernons Annotated Texas Statutes, but of Article II, Section 5 and Article 16, Section 40 of the Texas Constitution,and the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, PREMISED CONSIDERED, Respondent respectfully prays that Petitioners' Petition

for Writ of Certiorari be denied and that attorney's fees be awarded.

Respectfully submitted,



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Attorney for Respondent

Respondent hereby incorporates Petitioners' Appendix and Opinions and Judgments cited therein as it appears in Petitioners' Petition for Writ of Certiorari as if such Appendix were fully reproduced for Respondent's Brief in Opposition to Petitioners' Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Brief in Opposition to Petitioners' Petition for Writ of Certiorari has been served on Petitioners by mailing same certified mail, return receipt requested, to Mr. Henry P. Hodge, Jr., Counsel of Record and City Attorney for the City of Wichita Falls, Texas, PO Box 1431, Wichita Falls, Texas 76301 on this the 30th day of October, 1981.

LARRY WATTS
Attorney for Respondent